U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 06Jun2002

CASE NO: 2001-INA-00119

In the Matter of:

DANIEL J. GLADEN,
Employer,

on behalf of
SILVIA MUNOZ,
Alien

Appearances:

LUIS SABROSO & ASSOCIATES,
Representative for the Employer and Alien,

Certifying Officer: ARMANDO QUIROZ, REGION IX

Before: HUDDLESTON, JARVIS, AND VITTONE
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Daniel Gladen's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(A)(5)(a), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where

the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decisions on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On or about May 15, 1995, Anna Maria Tellez filed with the California Employment Development Department ("EDD")a Form ETA 750 Application for alien Certification on behalf of the Alien, Silvia Munoz. (See AF 70). [1] The job opportunity was listed as Child Monitor/Tutor. (AF 22). The job requirements included six years of grade school, six years of high school and two years experience in the job offered. (Id). EDD classified the position as Children's Tutor. (Id.).

Maria Tellez died in 1997 and Employer, who was her husband, was substituted in the case. (AF 22). The listed Representative has represented Tellez, Employer and the Alien at all times. On August 21, 1996, EDD sent an Assessment Notice to Tellez and her representative which stated in part that:

"EXCESSIVE REQUIREMENTS"

"The usual amount of education, training, and/or experience for this job is **6 months to 1 year.** Amend or justify the education, training, and/or experience required. If you choose to justify, document the business necessity of this requirement." (AF 56).

The job was advertised with the two year requirement. (AF 49). There were no U.S. Applicants and EDD transmitted the file to the CO. (AF 21). On November 7, 2000, the CO issued a Notice of Findings ("NOF") which proposed to deny the application. (AF 18). The CO found that:

"Finding: The requirement considered restrictive is two years experience.

[1] The file was accepted for processing on December 19, 1995. (AF 18).

"Job Service notified you on 21 August 1996 that your requirement exceeded the Specific Vocational Preparation time (six to twelve months) for the occupation of Children's Tutor 099.227-010. You have not responded to this finding." (AF 19).

The NOF gave employer two options:

1. Delete the restrictive requirement and readvertise the position, or
2. Justify the requirement based on business necessity. (AF 19).

The Employer, in his rebuttal, chose to justify the requirement based on business necessity. The following excerpts from the rebuttal indicate Employer's justification:

"The employer believes that it is necessary that the individual for this position should be someone who is trustworthy and with enough experience to take proper care of his children for eight hours a day. The qualities that the Child Monitor/Tutor must have are good credibility, a positive letter of recommendation, and past experience with one family for a minimum of two years.

"Now, the employer questions that fact that someone who only has one year of experience with, only one family is not found to be capable or as well experienced as would an individual who has two years of experience.

. . . . . .

"Certain questions arise when an individual only has six months to one year of experience with one employer. This demonstrates that the employer was not satisfied with the individual's performance, or perhaps the individual was unreliable, unreasonable, and unpleasant with the children, *causing physically or mental harm.*" (AF 2-3)

The CO issued a Final Determination ("FD") on February 21, 2001, which denied the application. (AF 9). The CO found that Employer had failed to justify the restrictive requirement based on business necessity. (AF 10). Employer filed a Petition for Review by the Board.

DISCUSSION

In the NOF, the CO found that the two year experience requirement was unduly restrictive because it exceeded the normal SVP requirement for the position of "Children's Tutor." The CO provided the Employer with options of either deleting the restrictive requirement or establishing that the requirement is justified by business necessity. The issue presented by this appeal is whether the requirement that applicants possess two years of experience in the job offered is unduly restrictive under section 656.21(b)(2).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of 656.21(b)(2) is to make a job opportunity available to qualified U.S. workers. *Venture International Associates,* 87-INA-569 (Jan. 13, 1989) (*en banc).* An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement.

Specific Vocational Preparation ("SVP") is defined in Appendix C of the DOT as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance in a specific job worker situation." DICTIONARY OF OCCUPATIONAL TITLES at 1009. The SVP for Children's Tutor[2] is listed in the DOT as 5, meaning over 6 months up to and including 1 year. (Id.). Thus, the Employer's requirement of two years experience is not included in the DOT and must be adequately documented as arising from business necessity. We also note that the Employer's requirement is for not only two years experience in the job, but two years experience in the job with one family. (AF 2-3).

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.,* 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to preforming, in a reasonable manner, the job duties as described by the employer. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation,* 90-INA-387 (July 30, 1991). Failure to establish business necessity for and unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige, & Associates, Inc.,* 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center,* 90-INA-395(June 30, 1992).

In the case at bench, the Employer has not furnished the documentation called for the NOF to establish a business necessity for the two year experience requirement.

Employer has not documented his assertions that a worker with the DOT requirements is less capable, trustworthy, reliable, or reasonable (AF 23) than one with two years experience.

Here, Employer has done no more than make unsubstantiated assertions that the position requires two years experience. In order to demonstrate business necessity an employer must show factual support or a compelling explanation. *ERF. Inc.,* 89-INA-105 (Feb. 14, 1990). Unsupported

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[2] The DOT description of a Children's Tutor (domestic ser.), Code 099.227-010 states: Cares for children in private home, overseeing their recreation, diet, health, and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children's behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children's Tutor, Nursery (domestic ser.). GOE: 10.03.03 STRENGTH: L GED: R4 M2 L4 SVP: 5 DLU:77

conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See generally, Our Lady of Guadalupe School,* 88-INA-313(June 2, 1989); *Inter-World Immigration Service, 89-INA-490(Sept. 1, 1989), citing Tri-P's Corp., dba Jack-In-The-Box,* 87-INA-686(Feb. 17, 1989). The Employer submitted insufficient evidence on rebuttal to support his assertions regarding business necessity. Consequently, we agree with the CO that the Employer has not established a basis for his restrictive experience requirement. It follows that the application for labor certification was properly denied.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

A
DONALD B. JARVIS
Administrative Law Judge

San Francisco, California